

# EXHIBIT A

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

IN RE VALVE ANTITRUST LITIGATION

Case No. 2:21-cv-00563-JCC

**MOTION FOR CLASS  
CERTIFICATION AND  
APPOINTMENT OF CO-LEAD CLASS  
COUNSEL**

**NOTE ON MOTION CALENDAR:  
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19	<u>Competition and Entry</u> , 59 J.L. & Econ. 105, 105 (2016).....	25

1 Plaintiffs Wolfire Games, LLC; Dark Catt Studios Holdings, Inc.; and Dark Catt Studios  
 2 Interactive LLC respectfully move for class certification pursuant to Fed. R. Civ. P. 23(b)(3).

3 **PRELIMINARY STATEMENT**

4 As this Court has recognized, “[m]ost-favored-nations restraints, such as those allegedly  
 5 utilized by Defendant, are unlawful if used to further anticompetitive goals.” Dkt. 80 at 6 (citing  
 6 *U.S. v. Apple, Inc.*, 791 F.3d 290, 305 (2d. Cir. 2015)). As detailed below, with the benefit of a  
 7 developed discovery record, Plaintiffs now have abundant common evidence that Defendant  
 8 Valve Corporation (“Valve”) does, in fact, use most-favored-nations restraints to block  
 9 competition and maintain its monopoly. The common evidence further shows that, as a result of  
 10 these restraints, Valve has been able to charge supracompetitive commissions to **every** member  
 11 of the proposed class, which consists of entities who paid a commission to Valve in connection  
 12 with the sale or use of a game on the Steam platform on or after January 28, 2017. Plaintiffs now  
 13 ask this Court to certify this class pursuant to Rule 23(b)(3), because Plaintiffs can prove **all**  
 14 aspects of their claims on a class-wide basis, and because the issues common to the class easily  
 15 predominate over any individualized ones.

16 Video games were historically sold at brick-and-mortar retailers, which entailed high  
 17 inventory, shipment, and overhead costs. In the early 2000s, Valve saw an opportunity to  
 18 distribute games more cheaply online. Valve originally built the Steam platform to distribute its  
 19 own games, but after recognizing it could also use Steam to sell and distribute **all** PC games,  
 20 Valve launched the Steam Store in 2005. Soon thereafter, Valve began to dominate the market  
 21 for PC game distribution.

22 Valve recognized, however, that its success could be threatened by other platforms,  
 23 which could compete to attract video game publishers by charging them commissions far lower  
 24 than the 30% commission (or “revenue share”) that Valve charged. Valve did not want to lose  
 25 either its dominant position or the inflated profits resulting from its 30% commission. Valve,  
 26 therefore, implemented and enforced a “platform most-favored-nations” policy (“PMFN  
 27 Policy”), to block such competition. Valve’s PMFN Policy, which remains in effect today,  
 28

1 prevents any publisher that sells its game on Steam—and given Valve’s dominance, nearly all  
 2 publishers must sell on Steam to survive—from (a) providing additional game content on another  
 3 platform that it does not make available on Steam (content parity); or (b) selling a game for a  
 4 lower price on another platform (price parity). By design, Valve’s PMFN Policy blocks the  
 5 exact ways that other platforms would compete with Valve in a well-functioning market (*i.e.*, on  
 6 content and price).

7 Absent Valve’s PMFN Policy, if a competing platform set a lower commission (*e.g.*,  
 8 12%) for sales on its platform, publishers would be incentivized to use that platform because  
 9 they could keep more of the revenue from each sale, while also lowering the retail prices charged  
 10 to consumers. Consumers would be able to buy more games at lower prices, and those  
 11 lower-priced games could also have enhanced content (like extra game levels). Facing this type  
 12 of competition, Valve would have to respond by lowering its own commission. More  
 13 competitive commissions would thus prevail across the market. This result would be a win/win  
 14 for everyone—except Valve. [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED] Ex. 3 (Newell Ex. 362) at ’022 (emphasis added).

19 Valve’s PMFN Policy blocks Valve from having to face competition from better and  
 20 lower-priced alternatives. Rival platforms cannot gain market share by charging publishers  
 21 lower commissions because, even when they do, Valve’s PMFN Policy blocks publishers from  
 22 offering lower prices, or superior content, on those competing platforms, removing the incentive  
 23 for consumers to purchase games on those platforms. The marketplace experience has proven  
 24 this time and again. Numerous platforms have tried to compete with Valve by setting lower  
 25 commissions or providing differentiated content that would benefit both game publishers and  
 26 consumers, but Valve’s PMFN Policy has blocked them *all* from succeeding. As a result, Valve  
 27 has dominated the market for twenty years without having to compete on price. All the while,  
 28



1 Valve maintains its 30% monopoly tax, reaping billions in profits by stifling competition.

2 Valve's profits far exceed what would prevail in a competitive market. [REDACTED]

3 [REDACTED] [REDACTED] [REDACTED] [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED] Ex. 4 (VALVE\_ANT\_0058963) at '963-965 (emphasis added).

7 Valve makes game publishers aware of its PMFN Policy, and threatens and punishes  
8 those who violate it. When a publisher does not comply, Valve typically begins a “conversation”  
9 with the publisher, where Valve often threatens to drop the game from Steam if the publisher  
10 does not fall in line. Valve can also threaten to punish a publisher by making its games less  
11 visible to consumers on Steam, starving the publisher of revenue. Because Steam is a must-have  
12 distribution platform for publishers, given that Valve has squashed all competitive threats,  
13 publishers have no viable option but to comply with Valve's PMFN Policy. Game publishers—  
14 the proposed class members here—are thus left with no option but to pay an inflated commission  
15 to Valve of 30% in connection with every game sold on Steam.<sup>1</sup>

16 At trial, Plaintiffs will rely on the testimony of Dr. Steven Schwartz, an expert economist,  
17 and Prof. Joost Rietveld, an industry expert, to prove that Valve's conduct harms every class  
18 member every time they pay this inflated commission to Valve. In his report, Dr. Schwartz  
19 explains how common evidence and analyses can be used to prove Valve's market power and to  
20 demonstrate how Valve has used its PMFN Policy to harm competition by imposing  
21 supracompetitive commissions on all class members. Among other things, Dr. Schwartz has  
22 constructed a series of rigorous economic models, grounded in the leading economic literature  
23 about PMFN policies, to demonstrate how Valve's PMFN Policy imposes higher commissions  
24 than would prevail in a competitive market. Dr. Schwartz also shows how he can use these same

25  
26 <sup>1</sup> In late 2018, Valve modified the revenue share agreement to three tiers as follows: Valve takes 30% on all of a  
27 game's earnings under \$10 million; 25% on all of a game's earnings between \$10 million and \$50 million; and 20%  
28 on all of a game's earnings over \$50 million. Schwartz Rpt. ¶44. All games except the very largest are subject to  
the 30% commission on every sale. *Id.*

1 economic models to calculate both class-wide and individual damages. Prof. Rietveld, who is  
 2 recognized as one of the leading researchers in the video game industry, explains how Dr.  
 3 Schwartz’s methodologies and conclusions are consistent with the dynamics of the PC gaming  
 4 industry.

5 Based on the work of these experts, and a robust discovery record full of ample common  
 6 evidence that supports each and every aspect of Plaintiffs’ claims, Plaintiffs now move under  
 7 Rule 23(b)(3) for the Court to certify the following class:

8 All persons or entities who, directly or through an agent, paid a  
 9 commission to Valve in connection with the sale or use of a game  
 10 on the Steam platform on or after January 28, 2017, and continuing  
 11 through the present until the effects of its scheme are eliminated  
 12 (the “Class Period”), and where either (1) the person or entity was  
 13 based in the United States and its territories or (2) the game was  
 14 purchased or acquired by a United States-based consumer during  
 15 the Class Period. Excluded from the Class are (a) Defendant, its  
 16 parents, subsidiaries, affiliate entities, and employees, and (b) the  
 17 Court and its personnel.

18 Dkt. 127 ¶375.<sup>2</sup>

19 Because Plaintiffs satisfy every applicable requirement of Rule 23, a class action is  
 20 clearly the method “best suited to adjudication of the controversy fairly and efficiently.” *Amgen,*  
 21 *Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460 (2013).<sup>3</sup> Accordingly, this Court should  
 22 certify the proposed class.

## 23 FACTUAL BACKGROUND

### 24 **A. As An Early Mover In The Market For Digital PC Game Distribution, Steam** 25 **Attained A Dominant Position**

26 PC game publishers—the class members—sell PC games to consumers. Ex. 1  
 27 (“Schwartz Rpt.”) ¶¶23-28. Through the 1990s and into the start of the new millennium, PC  
 28 game publishers primarily distributed PC games via physical media, such as floppy disks or

<sup>2</sup> Consistent with federal antitrust law, this definition limits class membership to entities that (i) directly paid a  
 supracompetitive commission to Valve, and (ii) are harmed by Valve, a U.S.-based entity. This definition excludes  
 foreign entities that exclusively sold games to foreign consumers.

<sup>3</sup> Unless otherwise stated, internal citations and quotation marks are omitted.

CD-ROMs, and consumers would typically buy PC games at brick-and-mortar retailers. *Id.* ¶¶17-22; Ex. 2 (“Rietveld Rpt.”) ¶25.

Valve started out as a PC game developer. Rietveld Rpt. ¶18. Before launching Steam, Valve developed two successful computer games (Half-Life and Counter-Strike), which by 2002 had an average of 3.4 billion player minutes per month. *See* Schwartz Rpt. ¶31. Valve developed Steam to update and maintain those games. Ex. 5 (Lynch Tr.) at 31-33. In 2003, Valve forced its entire user base of 2-3 million players to install and use Steam when they purchased the blockbuster sequel to Half-Life, Half-Life 2. *See* Schwartz Rpt. ¶¶32-33; Rietveld Rpt. ¶¶122-126.

But Valve realized that Steam need not be limited to Valve’s own games. Rather, it could be used to distribute *all* PC games via the internet, at a fraction of the cost of traditional brick-and-mortar distribution. Schwartz Rpt. ¶¶19-22, 34-35; Rietveld Rpt. ¶¶26, 38-39. But while Valve had lower costs than traditional distributors, it set a *price* roughly equal to those distributors (*i.e.*, 30%).<sup>4</sup> Schwartz Rpt. ¶¶42-43. By earning revenue roughly equal to traditional distributors, but at much lower cost, Valve earned significantly more profit per sale than brick-and-mortar retailers. *Id.* ¶¶17-22, 43, 145-149.

Steam became a must-have platform for consumers from nearly the moment it launched. *Id.* ¶¶31-33. By 2007, most major publishers were distributing their PC games on Steam, including publishers such as Epic, Atari, Activision, Eidos, 2K, Ubisoft, Sega, THQ, Bethesda, and Electronic Arts (“EA”). *See id.* ¶34. [REDACTED]

[REDACTED] *Id.* ¶¶130-134.

<sup>4</sup> [REDACTED] *see, e.g.*, Ex. 7 (VALVE\_ANT\_0019722) at ’724; Ex. 8 (VALVE\_ANT\_0042738) at ’741; Ex. 9 (VALVE\_ANT\_0038381) at ’384; Ex. 10 (VALVE\_ANT\_0019732) at ’735; Ex. 11 (VALVE ANT\_0040316) at ’319 [REDACTED]

Valve has maintained its monopoly—and protects its bloated 30% commission—through its PMFN Policy, which requires both content and price parity. Valve enforced its PMFN Policy through the “Steam Business Team,” one of Valve’s “cabals,”<sup>6</sup> throughout the class period.

Valve sets forth its content parity requirement in its Steam Distribution Agreements (“SDAs”), which Valve requires all Steam publishers to sign. [REDACTED]

<sup>5</sup> See also Ex. 12 (EPIC\_VALVE\_0000001) at '001 (Epic determining the “Final Platform Splits” to be “88/12” based on financial model); Ex. 13 (EPIC\_VALVE\_0000391) at '391 (Epic analyzing the costs of EGS and showing a 12% commission will be profitable); Ex. 14 (EPIC\_VALVE\_0000058) at '059 (noting that EGS would still be profitable with a 12% commission); Ex. 15 (Lynch Ex. 135) at '654-655 (Tim Sweeney informing Valve EGS would be launched with a 12% commission); Ex. 16 (VALVE\_ANT\_1244411) at '411 (Tim Sweeney noting the “fully loaded cost of distributing a >\$25 game in North America and Western Europe is under 7% of gross”).

<sup>6</sup> A “cabal” is Valve “shorthand for a team or a product group.” Ex. 17 (Giardino Tr.) at 179.

[REDACTED]

[REDACTED]

[REDACTED]

Ex. 18 (Gerber Ex. 98) at '371 (emphases added). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Valve also mandates price parity. Valve has communicated this aspect of its PMFN Policy in various ways over time. Schwartz Rpt. ¶¶150-167. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>7</sup> Steam Keys are codes that customers purchase outside of Steam (including at other online stores and at retail stores), which they can activate to play games on Steam. Schwartz Rpt. ¶¶45-47.

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED] Schwartz Rpt. ¶158.

4 At the motion to dismiss stage, Valve represented to the Court that the PMFN Policy  
5 either did not exist at all, or that it applied only to the sale of Steam Keys. Dkt. 74 at 3 (“Wolfire  
6 suggests the Guidelines require non-Steam-enabled games to have the same price as well, *but*  
7 *that’s simply not true*”) (emphasis added), *id.* at 19 (“Wolfire’s suggestion that this provision  
8 supports a broader price constraint flatly contradicts this plain meaning.”); Dkt. 79 at 11-12 (“*No*  
9 *one has ever seen this shadow policy.* . . . In short, Wolfire’s claims regarding this alleged policy  
10 are *thoroughly fanciful.*”) (emphases added). Valve likely made these representations because it  
11 is aware that its PMFN Policy raises serious questions under the antitrust laws. [REDACTED]  
12 [REDACTED]  
13 [REDACTED]

14 [REDACTED] Ex. 22 (Newell Ex. 352) at ’963.

15 The common evidence shows, however, that Valve’s representations were unequivocally  
16 false. In fact, the PMFN Policy is central to Valve’s business model, and applies across *all*  
17 transactions on the Steam platform. That is why, for example, Valve sent publishers an  
18 announcement instructing them to generally “make sure that you’re not disadvantaging Steam  
19 customers” when setting game prices on Steam. Ex. 23 (Giardino Ex. 188) at ’240. Moreover,  
20 the record is replete with common evidence that Valve regularly confirmed to publishers in no  
21 uncertain terms that its PMFN Policy (including pricing parity specifically) applies in equal force  
22 regardless of whether Steam Keys are involved. [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

26 [REDACTED] Ex. 24 (Powers 30(b)(6) Ex. 55) at ’921 (emphases added); *see*  
27 *also, e.g.,* Ex. 25 (Butlin Ex. 120) at ’353 [REDACTED]  
28 [REDACTED]

1 [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]; Ex. 27 (MSFT\_VALVE\_000000555) at '556-657 (Microsoft  
 4 employee asking "does Steam require price parity?" and another responding "Yes – they  
 5 absolutely do. . . . Its [sic] not formally listed in documentation in Steamworks, but always  
 6 addressed in-person.").

7 Many (many) more examples abound. *See, e.g.*, Ex. 28 (VALVE\_ANT\_2602243) at  
 8 '243 [REDACTED]

9 [REDACTED]  
 10 [REDACTED] (emphasis added); Ex. 21 (Giardino Ex. 186) at '087 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED]; Ex. 29 (Kroll Ex. 304) at '440 [REDACTED]

13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED]; Ex. 30 (Giardino Ex. 178) at '439 [REDACTED]

16 [REDACTED] (emphasis added);  
 17 Ex. 31 (Newell Ex. 353) at '439 [REDACTED]  
 18 [REDACTED] (emphasis added); Ex. 32 (Giardino Ex. 195) at '887 [REDACTED]

19 [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED].

22 Any claim by Valve to the contrary lacks credibility and cannot be reconciled with the  
 23 abundant evidence on this common issue.

#### 24 **C. Valve Enforced Its PMFN Policy Against Publishers Across The Industry**

25 In addition to laying out its content and pricing parity requirements directly in rules and  
 26 guidelines, Valve also seized every opportunity to continuously remind publishers about its  
 27 PMFN Policy. [REDACTED]

Ex. 33 (Powers 30(b)(6) Tr.) at 57, 64-68; *see also* Ex. 27 (MSFT\_VALVE\_000000555) at '556 (stating that Valve “always addressed” its PMFN Policy “in-person” with publishers).

*See, e.g.*, Ex. 34 (Butlin Ex. 131) at '289

. If these “conversations” and “reminders” were not enough to stop the violations, Valve took more punitive measures.

Valve has punished publishers for violating its PMFN Policy by delisting (or threatening to delist) a publisher’s game from Steam altogether.

Ex. 35 (Malone Ex. 248) at '684.

*Id.*

*Id.* In other words, Valve directly blocked price competition.

Ex. 36 (Gerber Ex. 107) at '883-84.

Ex. 37 (Blue Ex. 86) at '912-13.

Ex. 38 (Schenck Ex. 385) at '943.



1 [REDACTED] *Id.* [REDACTED]

2 [REDACTED]

3 [REDACTED]. *Id.* at '942. [REDACTED]

4 [REDACTED]

5 *Id.* at '936.

6 Again, the common evidence here is overwhelming. Time and again, Valve threatened  
7 game publishers with delisting their games if they did not comply with Valve's PMFN Policy.

8 *See, e.g.*, Ex. 39 (Ruymen Ex. 1) at '483 [REDACTED]

9 [REDACTED]; Ex. 40 (Giardino Ex. 196) at '521 [REDACTED]

10 [REDACTED]

11 [REDACTED]; Ex. 41 (VALVE\_ANT\_0048944) at '944

12 [REDACTED]

13 [REDACTED]; Ex. 42

14 (VALVE\_ANT\_1207052) at '054 [REDACTED]

15 [REDACTED]; Ex. 43 (Malone Ex. 249) at '343 [REDACTED]

16 [REDACTED];

17 Ex. 44 (VALVE\_ANT\_0340706) at '709 [REDACTED]

18 [REDACTED]; Ex. 45

19 (VALVE\_ANT\_0051718) at '718 [REDACTED]

20 [REDACTED]

21 [REDACTED]; Ex. 46 (Gerber

22 Ex. 101) at '289-290 [REDACTED]

23 [REDACTED]; Ex 30 (Giardino Ex. 178) at '439 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]; Ex 47 (Giardino Ex. 191) at '819 [REDACTED]

27

28

1 [REDACTED]  
2 [REDACTED]  
3 In addition to delisting, Valve enforced its PMFN Policy by reducing (or threatening to  
4 reduce) the visibility of publishers' games on the Steam platform, thereby hindering their ability  
5 to make sales. [REDACTED]

6 [REDACTED]  
7 [REDACTED] Ex. 48 (Powers 30(b)(6) Ex. 60) at '129. [REDACTED]  
8 [REDACTED]  
9 [REDACTED]

10 [REDACTED] *Id.* at '128. [REDACTED]  
11 [REDACTED] *Id.* at '127. This conduct was common and  
12 persistent. Ex. 49 (Malone Ex. 245) at '157 [REDACTED]  
13 [REDACTED]  
14 [REDACTED];

15 Ex. 50 (Ruymen Ex. 9) at '254-256 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]; Ex. 51 (VALVE\_ANT\_1193238) at '241 [REDACTED]  
18 [REDACTED]; Ex. 52 (Newell Ex. 346) at '932 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

22 During discovery, Valve unconvincingly claimed that the multitude of emails enforcing  
23 its PMFN Policy each constituted nothing more than one-off deviations from Valve's actual  
24 policies. Again, this claim is simply incredible. [REDACTED]  
25 [REDACTED]

26 [REDACTED] *See, e.g.*, Ex. 53 (Powers Ex. 45) at '489 [REDACTED]  
27 [REDACTED]; Ex 54 (Giardino Ex. 194)  
28

at '191 [REDACTED]  
 [REDACTED]; Ex 32 (Giardino Ex. 195) at '887 [REDACTED]  
 [REDACTED]; Ex. 24 (Powers 30(b)(6) Ex. 55) at '922 [REDACTED]  
 [REDACTED]  
 [REDACTED] (emphasis  
 added); Ex. 55 (Kroll Ex. 305) at '865 [REDACTED]  
 [REDACTED]  
 [REDACTED] (emphasis added); Ex. 56 (VALVE\_ANT\_0262762) at '763 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]; Ex. 57 (VALVE\_ANT\_1220449) at '456 [REDACTED]  
 [REDACTED] (emphasis  
 added); Ex. 50 (Ruymen Ex. 9) at '255 [REDACTED]  
 [REDACTED] (emphasis added); Ex. 58  
 (Giardino Ex. 189) at '426 [REDACTED]  
 [REDACTED]

**D. Valve Has Maintained Its High Commission While Blocking Competitive Threats**

The harmful effects of Valve's PMFN Policy can be seen in how Valve has blocked competition from rivals. Although several major game publishers have attempted to leverage their size to launch digital PC game stores, *see* Rietveld Rpt. ¶43, each attempt has failed to make material inroads that would check Valve's monopoly power.

EA & Origin. EA is a major PC game publisher and developer that explored a variety of ways to avoid Valve's 30% commission. Valve's PMFN Policy has blocked each attempt. Rietveld Rpt. ¶¶92, 96-97, 223; *see also* Schwartz Rpt. ¶¶215-217.

EA first attempted to avoid Valve's commission by using an alternative, cheaper payment method for in-game purchases made on Steam. In-game purchases (also called "in-game content," "in-app purchases," "IAPs," "downloadable content," or "micro-transactions") are

purchases of content within a game, rather than the purchase of a game itself, Rietveld Rpt. ¶¶117-121, and they are also subject to Valve's 30% commission. Schwartz Rpt. ¶¶42-44, 215.

[REDACTED]

[REDACTED] Ex. 59 (Lynch Ex. 138) at '478. [REDACTED]

[REDACTED]

[REDACTED] Ex. 59 (Lynch Ex. 138) at '478.

EA next attempted to launch the Origin PC game store in June 2011, as a competitor to Steam. To jumpstart Origin's user base, EA began publishing its new titles on Origin and other distribution platforms, which also avoided paying Steam's commission. Rietveld Rpt. ¶¶96-97; Schwartz Rpt. ¶216. In October 2011, EA also began publishing third-party games, including games from major publishers such as Capcom. Rietveld Rpt. ¶¶92, 96-97. [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] Schwartz Rpt. ¶¶216-217; Rietveld Rpt. ¶96-97.

EA ultimately surrendered, announcing it would bring its games back to Steam in 2019. Ex. 60 (VALVE\_ANT\_0059430) at '430. Origin withered and ultimately died, Rietveld Rpt. ¶¶96-97; Schwartz Rpt. ¶¶216-217.

Ubisoft & Uplay/Uconnect. [REDACTED]

[REDACTED] Ex. 61 (Malone Tr.) at 44. Ubisoft attempted to self-distribute through its own platform, Uplay, launching in 2012. Rietveld Rpt. ¶¶94-95; Schwartz Rpt. ¶¶213-214. [REDACTED]

[REDACTED] Ex. 62 (Malone Ex. 263) at '128. [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

Ex. 63 (Lynch Ex. 141) at '961-962. [REDACTED]

[REDACTED]

1 [REDACTED]  
2 [REDACTED] Ex. 64 (Malone Ex. 261) at '197.

3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED] As a result, Ubisoft launched Division 2 solely on Uplay and EGS. Rietveld Rpt. ¶94.  
7 Ultimately, this strategy failed and Division 2 is now available on Steam. *See id.*

8 Epic & EGS. Epic began development of EGS around June 2018. *See* Ex. 67  
9 (EPIC\_VALVE\_0000338) at '338. Epic planned to leverage its first-party games—specifically  
10 Fortnite—to build an instant customer base for EGS. *Id.* at '340-342; Ex. 14  
11 (EPIC\_VALVE\_0000058) at '058 (Tim Sweeney Q&A noting the launching of EGS was  
12 prompted by Fortnite bringing in PC gamers). The cost to run EGS was sufficiently low that  
13 Epic could charge publishers a 12% commission, less than half of Valve's. Ex. 68  
14 (EPIC\_VALVE\_0000007) at '007.

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 Ex. 15 (Lynch Ex. 135) at '654-655. [REDACTED]  
19 [REDACTED] *Id.* at  
20 '655. EGS launched with, and continues to offer, a host of financial benefits to publishers.  
21 Rietveld Rpt. ¶88. Epic's announcement of EGS spurred a brief outbreak of competition in the  
22 market. Schwartz Rpt. ¶302-313. Epic found initial success, securing an exclusive deal with  
23 Ubisoft to publish Division 2. Rietveld Rpt. ¶¶94, 156, 170-171.

24 But, because of Valve's PMFN policy, EGS has been unable to gain market share. [REDACTED]  
25 [REDACTED]  
26 [REDACTED] Schwartz Report, Attachment E-1. Given this low  
27 share, it has yet to become profitable. Rietveld Rpt. ¶89. The vast majority of its formerly  
28

EGS-exclusive content is now available on Steam, reflecting Steam's immense market power. Schwartz Rpt. ¶¶213, 310. Because Valve's PMFN Policy precludes publishers from differentiating content offered on Steam and EGS, publishers have little incentive to offer games on EGS and consumers have little incentive to use the platform. Rietveld Rpt. ¶¶168-225. Put simply, Epic cannot break the Steam monopoly, even though it offers a commission *less than half* of Valve's, because Valve's PMFN Policy prevents Epic from competing on prices charged to consumers for games sold on both EGS and Steam. Schwartz Rpt. ¶¶302-313.

Ex. 51 (VALVE\_ANT\_1193238) at '240-241.

*Id.* at '239.

Ex. 61 (Malone Tr.) at 212.

Ex. 69 (Lynch Ex. 134) at '674

; Ex. 70

(VALVE\_ANT\_0471786) at '188

Schwartz Rpt. ¶308.

Ex. 5 (Lynch Tr.) at 101-02

As Plaintiffs' experts demonstrate, this small change by Valve illustrates that, without the PMFN Policy, full competition would lead to much more significant reductions in Valve's commission, benefiting game publishers and consumers across the market. Schwartz Rpt. ¶¶302-313.

## LEGAL STANDARDS

First, under Rule 23(a), Plaintiffs must show that there are “questions of law or fact common to the class,” and the requirements of “numerosity, typicality and adequacy of representation” are also met. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 663 (9th Cir.) (2022). Second, Plaintiffs must show, by a “preponderance of evidence,” that the class fits into one of three categories of Rule 23(b). *Id.* at 665. To certify a class under Rule 23(b)(3), Plaintiffs must show “the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

While the Court’s “class certification analysis must be rigorous and may entail some overlap with the merits of the plaintiff’s underlying claim, . . . [m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.” *Amgen*, 568 U.S. at 465-66. “[P]laintiffs have carried their burden of satisfying the Rule 23(b)(3) requirements as to [a] common question of law or fact” if their “evidence ‘could have sustained a reasonable jury finding’ on the merits of [that] common question.” *Olean*, 31 F.4th at 667 (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 455 (2016)).

## ARGUMENT

### **I. THE PROPOSED CLASS SATISFIES RULE 23(A)**

***The Class is Sufficiently Numerous.*** The proposed class consists of at least 31,824 members and easily satisfies Rule 23(a)(1)’s numerosity requirement. Schwartz Rpt. ¶399; *Ochoa v. McDonald’s Corp.*, 2016 WL 3648550, at \*4 (N.D. Cal. July 7, 2016) (“40 or more members” is sufficient).

***Common Questions of Law and Fact Exist.*** To satisfy commonality, “even a single common question will do.” *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014). “Rule 23(a)(2)’s commonality requirement is subsumed under, or superseded by, the more

1 stringent Rule 23(b)(3) requirement that questions common to the class predominate over other  
 2 questions.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609 (1997). As set forth in detail in  
 3 § II *infra*, numerous common issues of law and fact that are central to Plaintiffs’ claims exist,  
 4 including questions of (1) market definition and market power, (2) anticompetitive conduct and  
 5 effects, (3) class-wide injury, and (4) damages, and those common issues predominate in this  
 6 case.

7 ***The Named Plaintiffs’ Claims are Typical of the Class.*** Rule 23(a)(3) requires that “the  
 8 claims or defenses of the representative parties are typical of the claims or defenses of the class.”  
 9 Fed. R. Civ. P. 23(a)(3). “[This] requirement is permissive, such that representative claims are  
 10 typical if they are reasonably coextensive with those of absent class members; they need not be  
 11 substantially identical.” *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017).  
 12 Typicality is “established by plaintiffs and all class members alleging the same antitrust violation  
 13 by the defendants,” and may be satisfied even if there is a disparity in the damages claimed by  
 14 representative parties and other class members. *In re Tableware Antitrust Litig.*, 241 F.R.D. 644,  
 15 649 (N.D. Cal. 2007). Here, the named Plaintiffs are typical because, like all other proposed  
 16 class members, they paid commissions to Steam and suffered an antitrust injury when they did  
 17 so. *See Sidibe v. Sutter Health*, 333 F.R.D. 463, 486-87 (N.D. Cal. 2019) (finding typicality in  
 18 an antitrust case because “the overarching gravamen of the plaintiffs’ claims is [the defendant’s]  
 19 alleged anticompetitive” conduct).

20 ***Named Plaintiffs Will Adequately Represent the Class.*** Rule 23(a)(4) requires that “the  
 21 representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P.  
 22 23(a)(4). This requirement is satisfied if the representative plaintiffs have no conflicts of interest  
 23 with class members and they and their counsel will vigorously prosecute the action on behalf of  
 24 the class. *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). Named Plaintiffs readily  
 25 meet these requirements. There is no intra-class conflict, as all class members share a common  
 26 interest in recovery of their supracompetitive commissions paid to Valve, and both named  
 27 Plaintiffs have vigorously prosecuted the action and will continue to do so.



1 Wolfire is a game publisher that sold five titles on Steam, including the popular game  
 2 Overgrowth. *See* Ex. 71 (*Wolfire Games*, STEAM, [https://store.steampowered.com/franchise/](https://store.steampowered.com/franchise/wolfire/)  
 3 wolfire/ (last visited Feb. 7, 2024)). Wolfire brought this lawsuit because “gamers and game  
 4 developers are being harmed by Valve’s conduct” and “most developers have little or no choice  
 5 but to sell on Steam and do as they’re told by Valve.” Ex. 72 (Rosen Ex. 73) at 1. Wolfire  
 6 helped counsel develop the first-to-file Complaint in this district, and has continued to provide  
 7 valuable industry knowledge and insights to litigate this matter.

8 Dark Catt is a game publisher that sold one title on Steam, *Djinni & Thaco: Trial by*  
 9 *Spire*. Valve removed Dark Catt’s game from Steam without prior notice, asserting that certain  
 10 game reviews amounted to review manipulation, which has effectively ended Dark Catt’s ability  
 11 to sell games because “not being on Steam means you’re not going to make any money in the PC  
 12 market.” Ex. 73 (Owens Tr.) 371. Dark Catt brought this lawsuit to “make sure that no game  
 13 company ever goes through what we went through” in being closed out of the PC game  
 14 distribution market. Ex. 74 (Robb Tr.) 287-88. As explained by Dark Catt’s CEO: “if Steam  
 15 doesn’t want to do business with us, fine, I accept that. But I want to be able to go down the  
 16 street and be able to sell my game and be able to go to their competitor. But there is no  
 17 competition in the marketplace.” *Id.* at 287-88. Like Wolfire, Dark Catt has provided valuable  
 18 industry knowledge to counsel.

19 The named Plaintiffs have each responded to Valve’s voluminous document requests,  
 20 produced thousands of documents from their files, and prepared and sat for nine depositions,  
 21 collectively. Their commitment to the litigation and their discovery obligations further  
 22 demonstrates their adequacy. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583,  
 23 595 (N.D. Cal. 2010).

## 24 **II. COMMON QUESTIONS PREDOMINATE UNDER RULE 23(B)(3)**

25 Rule 23(b)(3) requires that “questions of law or fact common to class members  
 26 predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3).  
 27 “Predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws.”  
 28

1 *Amchem*, 521 U.S. at 625. “The predominance inquiry asks whether the common,  
 2 aggregation-enabling, issues in the case are more prevalent or important than the non-common,  
 3 aggregation-defeating, individual issues.” *Olean*, 31 F.4th at 661. “Predominance is not . . . a  
 4 matter of nose-counting,” *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir.  
 5 2016), and certification “may be considered proper under Rule 23(b)(3) even though other  
 6 important matters will have to be tried separately,” *Tyson*, 577 U.S. at 453. To establish  
 7 predominance, Plaintiffs need only show that “*questions* common to the class predominate, not  
 8 that those questions will be answered, on the merits, in favor of the Class.” *Amgen*, 568 U.S. at  
 9 459 (emphasis in original).

10 Analysis of predominance under Rule 23(b)(3) begins with the elements of the  
 11 underlying cause of action. Plaintiffs will establish, with common evidence: (1) a violation of  
 12 antitrust law (both Section 1 and Section 2 of the Sherman Act); (2) injury or impact resulting  
 13 from those violations; and (3) damages. *See In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d  
 14 1167, 1183 (N.D. Cal. 2013). More specifically, Plaintiffs’ principal claim arises under Section 2  
 15 of the Sherman Act, which requires proof that (a) Valve possesses monopoly power in a relevant  
 16 market; (b) Valve willfully acquired or maintained that power; and (c) Valve’s conduct resulted  
 17 in antitrust injury. *Fed. Trade Comm’n v. Qualcomm Inc.*, 969 F.3d 974, 990 (9th Cir. 2020).

18 As to Section 1 of the Sherman Act, challenging Valve’s imposition of its PMFN Policy,  
 19 that claim requires proof of: “(1) an agreement, conspiracy, or combination among two or more  
 20 persons or distinct business entities; (2) which is intended to harm or unreasonably restrain  
 21 competition; and (3) which actually causes injury to competition, beyond the impact on the  
 22 claimant, within a field of commerce in which the claimant is engaged (i.e., ‘antitrust injury’).”  
 23 *Austin v. McNamara*, 979 F.2d 728, 738 (9th Cir. 1992). In assessing either the Section 1 or the  
 24 Section 2 claims here, a court will look to a Rule of Reason analysis to determine the restraint’s  
 25 “actual effect” on competition. *See, e.g., Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 998 (9th  
 26 Cir. 2023).

As detailed below, Plaintiffs can show the elements of both their Section 1 and Section 2 claims using common evidence. Accordingly, common issues predominate over any individual ones.<sup>8</sup>

**A. Common Evidence Establishes The Relevant Market And Valve’s Monopoly Power In That Market**

*First*, the relevant market inquiry, and all evidence related to it, is necessarily common to the class and will not vary based on which class member is asserting an antitrust claim. *Castro v. Sanofi Pasteur Inc.*, 134 F. Supp. 3d 820, 846 (D.N.J. 2015) (“Defining the relevant market focuses on common data, expert analysis, and economic tests; such proof generally does not vary by class member.”). Plaintiffs’ economist, Dr. Schwartz, has explained why common economic principles warrant treating third-party digital PC game distribution platforms as a distinct relevant market, and common evidence supports his conclusions. Schwartz Rpt. ¶¶48-116; *see also* Rietveld Rpt. ¶¶49-82.

*Second*, Valve’s “market power is capable of being proved at trial through common evidence.” *Giuliano v. Sandisk Corp.*, 2015 WL 10890654, at \*17 (N.D. Cal. May 14, 2015). As the first major mover in the digital PC game distribution market, Valve achieved monopoly power relatively soon after the Steam Store’s launch. Schwartz Rpt. ¶¶17-22, 32-36, 121-149. Steam became a must-have platform across the industry, given the advantages of digital distribution (such as avoiding physical packaging costs or the need to visit a brick-and-mortar retailer in person). *Id.* ¶¶17-22, 67, 69-77. [REDACTED]

[REDACTED] *Id.*

<sup>8</sup> Because common evidence supports Plaintiffs’ Sherman Act claims, common evidence also supports Plaintiffs’ claims under the Washington Consumer Protection Act (“WCPA”), which “closely parallels federal antitrust laws.” *Golob Sons v. Schaake Packing Co.*, 93 Wash. 2d 257, 259 (Wash. 1980). Under Washington’s choice-of-law rules, Plaintiffs are entitled to proceed under the WCPA because, as determined by the applicable Restatement factors, Washington is the state with the “most significant relationship” to this action: Valve is based and incorporated in Washington, Valve injured Plaintiffs by creating and enforcing the PMFN Policy from Washington, and Valve’s relationship with Plaintiffs is centered in Washington—the state where Valve develops and services Steam, and the state specified in choice-of-law and choice-of-forum provisions in Valve’s standard SDA (*e.g.*, Ex. 75 (Giardino Ex. 199) at ’461). *See Johnson v. Spider Staging Corp.*, 87 Wash.2d 577, 580-81 (1976).

¶¶130-134, Attachment E-1. And there is ample direct and indirect evidence of Valve’s market power. *See Supra* Factual Background § D; *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1112 (9th Cir. 2021) (“Market power is the ability to raise prices above those that would be charged in a competitive market.”).

#### **B. Common Evidence Regarding Anticompetitive Harm In The Relevant Market**

In addition, the common evidence detailed above shows that Valve requires publishers to agree to a PMFN Policy, encompassing both price and content parity. *Supra* Factual Background; *see also In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d at 1187-91 (N.D. Cal. 2013). Common evidence also demonstrates that Valve uses its PMFN Policy to maintain its dominant position in the market for third-party digital PC game distribution platforms. *See In re Glumetza Antitrust Litig.*, 336 F.R.D. 468, 475 (N.D. Cal. 2020) (Section 2 claims “readily lend themselves to common evidence” because “defendants’ use and maintenance of monopoly power, as opposed to individual plaintiff’s conduct, drives the claim.”); *see also* Schwartz Rpt. ¶¶150-196.

Moreover, applying a Rule of Reason framework to each of their claims, *see Epic Games*, 67 F.4th at 998; *Qualcomm*, 969 F.3d at 991, Plaintiffs will show that Valve’s PMFN Policy “has a substantial anticompetitive effect that harms consumers” in market for third-party digital distribution of PC games via platforms, *Epic Games*, 67 F.4th at 983. Plaintiffs can make this showing either “directly or indirectly.” *Id.* Under either approach, Plaintiffs can make their showing using common evidence. *Cf. In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, 622 F. Supp. 3d 22, 46-49 (E.D. Pa. 2022) (denying defendant’s summary judgment motion where class plaintiffs adduced common direct and indirect evidence of anticompetitive effects).

To demonstrate anticompetitive effects directly, “the plaintiff must provide proof of actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market.” *Epic Games*, 67 F.4th at 983. Common direct evidence of

1 anticompetitive effects supports a finding of predominance. *See In re Processed Egg Prod.*  
 2 *Antitrust Litig.*, 312 F.R.D. 171, 183 (E.D. Pa. 2015).

3 As discussed above, Valve’s 30% commission far exceeds the competitive level (17.7%),  
 4 which is direct evidence of anticompetitive effects. *Epic Games*, 67 F.4th at 984 (“A  
 5 supracompetitive price is simply a price above competitive levels.”); *see also US Airways, Inc. v.*  
 6 *Sabre Holdings Corp.*, 938 F.3d 43, 61-63 (2d Cir. 2019) (evidence of supracompetitive pricing  
 7 sufficient to sustain a jury verdict on competitive effects); Schwartz Rpt. ¶377. Valve’s  
 8 excessive profits, *Id.* ¶¶135-149, are further direct evidence of supracompetitive pricing, *US*  
 9 *Airways*, 938 F.3d at 61, 63 (in discussing a “mountain of evidence” supporting anticompetitive  
 10 effects, citing expert testimony that the Defendant’s profits were “very, very, very high”).

11 Dr. Schwartz also explains how Valve’s conduct has suppressed overall output in the  
 12 relevant market. As a matter of basic economics, when game prices to consumers are higher  
 13 than competitive levels, consumers will buy fewer games. *Id.* ¶129. Additionally, Valve’s  
 14 conduct diminishes PC desktop game variety, and accordingly limits consumer choice. *Id.*  
 15 ¶¶232-236.

16 Dr. Schwartz also demonstrates how Valve’s conduct leads to reduced quality. *Id.*  
 17 ¶¶220-240. Because it faces virtually no competition, Valve does not significantly invest in  
 18 improving the Steam platform. Ex. 33 (Powers 30(b)(6) Tr.) at 37-38 [REDACTED]

19 [REDACTED]  
 20 [REDACTED]; Ex. 76 (Johnson Ex. 27) at ’458 [REDACTED]  
 21 [REDACTED]

22 [REDACTED] For example, Valve regularly  
 23 disrupts gamers using Steam by taking Steam down for “planned weekly downtime  
 24 maintenance.” Ex. 77 (Boyd Tr.) at 67. [REDACTED]

25 [REDACTED] *Id.* at 69-70. In a  
 26 but-for world without Valve’s PMFN Policy, Valve would face more competition and would be  
 27 compelled to improve the quality of its platform. Schwartz Rpt. ¶240.

Antitrust plaintiffs can also demonstrate anticompetitive effects indirectly, which requires “some evidence” that the defendant used “market power to harm competition.” *Epic Games*, 67 F.4th at 983. This inquiry need not be “extensive” or “highly technical”—it is “sufficient that the plaintiff prove the defendant’s conduct, as matter of economic theory, harms competition.” *Id.* One form of such indirect evidence is “excluding would-be competitors that would offer differentiated products,” *id.* at 983-84, while other forms may include, for example, increased prices, reduced output or quality, or reduced consumer choice, as discussed above, *see e.g.*, *N. Am. Soccer League, LLC v. U.S. Soccer Fed’n, Inc.*, 883 F.3d 32, 42 (2d Cir. 2018).

Plaintiffs have ample indirect evidence of anticompetitive effects. Relying purely on common evidence, Dr. Schwartz concludes that Valve has monopoly power. *Supra* § II.A. Further, Plaintiffs have adduced ample evidence of would-be competitors whose attempts to enter the market failed or are failing. *Supra* Factual Background. This common evidence likewise supports a predominance finding. *In re Suboxone (Buprenorphine Hydrochloride & Nalaxone) Antitrust Litig.*, 421 F. Supp. 3d 12, 32-33 (E.D. Pa. 2019), *aff’d*, 967 F.3d 264 (3d Cir. 2020) (certifying class where theory of injury was that “[a]bsent [the defendant]’s actions, the generic Suboxone tablets would theoretically have entered the market and competed with” the defendant).

### **C. Common Evidence Shows That All Or Virtually All Class Members Suffered Antitrust Injury**

Antitrust impact “is the ‘fact of damage’ that results from a violation of the antitrust laws.” *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2006 WL 1530166 at \*7 (N.D. Cal. June 5, 2006). Plaintiffs can show with common evidence that Defendants’ anticompetitive conduct had class-wide impact. To do so, Plaintiffs will rely principally on the work of Dr. Schwartz, an economist with expertise in industrial economics and platform competition.

Proof of class-wide impact flows directly from some basic economic facts about the market. As Dr. Schwartz explains: “All major platforms that digitally distribute third-party PC games, including Valve, impose a standardized pricing structure on all publishers, typically a

fixed commission.” Schwartz Rpt. ¶¶242. In Valve’s case, Valve sets its commission structure in the SDA that applies to *all* Valve publishers. *Id.* Given this uniform pricing policy, if Plaintiffs are capable of showing that the default commission rate would decrease to some degree because of price competition if Valve did not have a PMFN Policy, then it readily follows that *all* class members would benefit by being able to pay the new, lower default commission rate. *Id.* [REDACTED]

[REDACTED] *Id.* ¶¶315-319.

Given these economic facts, Dr. Schwartz can show class-wide impact by demonstrating the default commission rate Valve charges would decrease in a but-for world free of Valve’s PMFN Policy. *Id.* ¶¶241-244. He does so in three distinct but complementary ways.

*First*, Dr. Schwartz constructs and applies economic models of platform competition that show that Valve’s PMFN Policy has both short- and long-term harmful effects on *all* class members. He begins by constructing a Platform Competition Model, derived from a model found in the relevant economic literature, the Boik-Corts model, which demonstrates that “PMFN clauses typically raise platform fees and retail prices and curtail entry or skew positioning decisions by potential entrants pursuing low-end business models.” *Id.* ¶245; Ex. 78 (Andre Boik & Kenneth S. Corts, The Effects of Most-Favored-Nation Clauses on Competition and Entry, 59 J.L. & Econ. 105, 105 (2016)). Dr. Schwartz adapts that model to the facts and circumstances of this case as his Platform Competition Model by using empirical estimates for the model’s inputs to study what would happen when Valve’s PMFN Policy is removed. Schwartz Rpt. ¶¶272-281. His model demonstrates that, if a competing platform entered the market and Valve did not have a PMFN Policy, the competing platform would have a much



1 lower commission and Valve would respond by lowering its own commission. At the same time,  
2 retail prices overall would decrease, leading to more games being sold in the market:



16 Schwartz Rpt. ¶¶274-276. These results are compelling evidence that Valve's PMFN  
17 Policy is causing both supracompetitive prices and reduced output. [REDACTED]

18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

22 But Dr. Schwartz does not stop there. As he explains, the results of this model depict the  
23 short-term competition caused by one platform's entry in the absence of the PMFN Policy. *Id.*  
24 ¶¶250, 279-280. To compete against this new platform (and others), Valve would need to lower  
25 its commission even more, or risk a significant loss of market share. *Id.* ¶279. That lowering  
26 would quickly lead to *all* commissions in the market being set at a competitive equilibrium. *Id.*  
27 ¶¶279, 334. To model that equilibrium, Dr. Schwartz constructs his Landes-Posner model,



1 which uses well-recognized literature to estimate what commission would prevail in a  
 2 competitive market, but for Valve’s illegal conduct. *Id.* ¶¶332-340. Dr. Schwartz shows that in  
 3 this competitive equilibrium, Steam’s but-for commission would be just [REDACTED]. *Id.* ¶377. These  
 4 results thus confirm that all class members were harmed by paying significantly higher prices  
 5 (commissions) to Valve because of its PMFN Policy. In sum, Dr. Schwartz’s results show  
 6 Valve’s PMFN Policy “leads to higher platform fees, deters entry by rivals, and increases  
 7 consumer prices.” *Id.* ¶243. These results are common evidence that all class members can rely  
 8 upon at trial to prove that they have experienced some amount of harm from Valve’s PMFN  
 9 Policy. *See, e.g., Iowa Pub. Employees’ Ret. Sys. v. Bank of Am. Corp.*, 2022 WL 2829880, at  
 10 \*25 (S.D.N.Y. June 30, 2022) (accepting use of economic analytical model to show class-wide  
 11 impact).

12 **Second**, Dr. Schwartz confirms this result by using the well-accepted yardstick approach,  
 13 which analyzes the commissions that occur in reasonably comparable platform markets. *See In*  
 14 *re DRAM Antitrust Litig.*, 2006 WL 1530166, at \*8-10 (accepting “yardstick” approach for  
 15 showing class-wide impact); *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*,  
 16 335 F.R.D. 1, 25 n.31 (E.D.N.Y. 2020) (accepting “use in this case of a market yardstick to show  
 17 class-wide impact in the but-for world”). He considers online retail marketplaces and online  
 18 vacation home rentals as potential benchmarks for his yardstick approach. Schwartz Rpt.  
 19 ¶¶282-301. He finds that the yardstick approach ultimately indicates “the market but-for  
 20 commission rate would be between 15% and 20%” in the market for third-party digital PC game  
 21 distribution via platforms. *Id.* ¶301. Dr. Schwartz concludes that all the benchmark markets lead  
 22 to a singular conclusion—that Valve’s PMFN Policy causes supracompetitive commissions. *Id.*  
 23 ¶¶282-301

24 **Third**, Dr. Schwartz looks to the limited empirical evidence of impact available in *this*  
 25 market, such as the attempted entry of EGS and other platforms. [REDACTED]

26 [REDACTED]

27 [REDACTED]

Dr. Schwartz explains that Valve’s response empirically demonstrates Valve’s commission for Steam is sensitive to the presence and degree of competition. *Id.* ¶¶302-313.

But as Dr. Schwartz explains, “[i]n the but-for world, where there was no PMFN, Steam would have likely faced a more expansive competitive threat and likely much earlier than Epic’s entrance.” *Id.* ¶309. Valve’s competitive response would likewise be stronger, and its commissions lower. Recognizing that economics predicts price approaches cost under competitive conditions, he analyzes the relevant costs in the industry to determine a lower bound for but-for commissions. *Id.* ¶311. He finds that “a 12% (or lower) take-rate would be sustainable” for platforms in the relevant market like Valve. *Id.* ¶312. Based on an analysis of Valve’s real-world costs, Dr. Schwartz shows empirically that matching Epic’s 12% commission rate would be profitable for Steam. *Id.* ¶313. This empirical analysis thus confirms that, in the but-for world, Valve would charge lower commissions to all class members—and demonstrates that Dr. Schwartz’ 17.7% but-for commission used to estimate damages is conservative. Once again, each class member could rely on this empirical showing to prove impact at trial. *Tyson*, 577 U.S. at 458 (assessing empirical evidence of class-wide impact based on “whether the sample at issue could have been used to establish liability in an individual action”).

#### **D. Plaintiffs’ Model Is Capable Of Calculating Class-wide Damages**

A “putative class must establish that damages are susceptible of measurement across the entire class.” *In re Glumetza Antitrust Litig.*, 336 F.R.D. at 479. “Antitrust plaintiffs may satisfy the predominance requirement by using a model that estimates the damages attributable to the antitrust injury, even if more individualized determinations are needed later to allocate damages among class members.” *Id.* The calculation of damages is a low bar and “need not be exact.” *See Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). The Supreme Court recognizes that “[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff’s situation would have been in the absence of the defendant’s antitrust violation.” *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981).

Dr. Schwartz bases damages on the competitive equilibrium predicted by his Landes-Posner model, which predicts that Valve's weighted-average commission in the but-for world will be 17.7%. Schwartz Rpt. ¶377. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* ¶¶400-402. Dr. Schwartz then assesses how much of this commission reduction would be passed down to consumers in the form of lower retail prices for PC games.

[REDACTED]

[REDACTED] *Id.* ¶¶379-397.

He then offsets damages by this percentage. *Id.* ¶402.

Dr. Schwartz's methodology arrives not only at an aggregate damages figure [REDACTED], but can also derive individual damages awards for each class member. *Id.* ¶¶406-410. Dr. Schwartz's methodology is repeatable and can be expanded to encompass later years when Valve produces additional transactional data during merits discovery or prior to trial. *Id.* ¶400. His methodology easily passes muster at this stage. *See In re High-Tech Emp. Antitrust Litig.*, 289 F.R.D. 555 (N.D. Cal. 2013) ("calculations need not be exact") (quoting *Comcast*, 569 U.S. at 35). Indeed, it is substantially *more* robust than the minimal requirement, at this stage, of providing an aggregate damages figure. *See In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 324 (E.D. Mich. 2001).

### III. RESOLVING THE DISPUTE AS A CLASS ACTION IS SUPERIOR TO ANY ALTERNATIVE

Finally, class certification is far superior to any alternative method for adjudicating this case. *See* Fed. R. Civ. P. 23(b)(3). *First*, as the Supreme Court has recognized, a "core" purpose of class actions is "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action." *Amchem Prods.*, 521 U.S. at 617. That purpose is clearly served for a case of this scale and complexity, where prosecuting these claims requires many millions of dollars. *Second*, while superiority might be lessened based on "the extent of

any independent litigation already begun by class members,” *In re Domestic Drywall Antitrust Litig.*, 322 F.R.D. 188, 200 (E.D. Pa. 2017), no class members have brought independent litigation here. *Third*, “class-wide litigation of common issues will reduce litigation costs and promote judicial efficiency.” *Dial Corp. v. News Corp.*, 314 F.R.D. 108, 121 (S.D.N.Y. 2015). *Fourth*, no inherent difficulties undermine the maintenance of this case as a class action.

#### IV. THE COURT SHOULD APPOINT PLAINTIFFS’ REQUESTED COUNSEL

Finally, Plaintiffs request the appointment of Quinn Emanuel Urquhart & Sullivan, LLP, Constantine Cannon LLP, Lockridge Grindal Nauen P.L.L.P., and Wilson Sonsini Goodrich & Rosati, P.C. to serve as Co-Lead Class Counsel.

Rule 23(g)(1)(A) identifies four factors used to determine lead counsel: “the work counsel has done;” “counsel’s experience;” “knowledge of the applicable law;” and the “resources that counsel will commit.” *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 WL 7882100, at \*66 (E.D.N.Y. Oct. 15, 2014); *see also* Fed. R. Civ. P. 23(g)(1)(B). Each factor favors these top-tier firms’ appointment. They bring extensive expertise in antitrust class actions, have worked efficiently and effectively to investigate and prosecute this case, and have already committed tens of thousands of hours and many millions of dollars investigating, developing, and litigating this matter. As discussed in the attached firm resumes, the firms have ably litigated and served as lead class counsel in many major antitrust actions nationwide, recovered billions of dollars in antitrust and other cases, and received awards recognizing the quality of their work. Exs. 80-83. They have also done a tremendous amount of work in this case, taking over twenty depositions and developing the robust evidentiary record supporting this motion. They have also worked well with Executive Committee member Vorys, Sater, Seymour & Pease, LLP, whose firm resume is also attached. Ex. 84. Accordingly, they meet all the requirements for appointment as Class Counsel.

#### CONCLUSION

Plaintiffs respectfully request that the Court certify the proposed class, appoint the named Plaintiffs as class representatives, and appoint Co-Lead Class Counsel.

DATED: February 8, 2024

Respectfully submitted,

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**WORD COUNT CERTIFICATION**

I certify that this memorandum contains 10,896 words, in compliance with the stipulated motion so ordered by the Court at Dkt. 178.

DATED: February 8, 2024

/s/ Alicia Cobb

Alicia Cobb, WSBA #48685

**CERTIFICATE OF SERVICE**

I hereby certify that on February 8, 2024, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel of record.

DATED: February 8, 2024

/s/ Alicia Cobb

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